Supreme Court, U.S.
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No. 03-2422

IN THE SUPREME COURT OF THE UNITED STATES

LEONARD GREGORY,

Petitioner,

v.

South Carolina Department of Transportation, Claudia Wilkes, Becky Dickson, Oscar Rucker, U.S. Department of Housing and Urban Development, Lonna Blue, Charles Stigger

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an individual can bring an action under the Fair Housing Act of 1988 for monetary relief against a State entity, and whether Eleventh Amendment immunity prohibits such a claim.

2. Whether an individual can bring an action under the Fair Housing Act of 1988 for monetary relief against an entity of the Federal Government, and whether Eleventh Amendment immunity prohibits such a claim.

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OPINIONS BELOW

The Court of Appeals wrote an unpublished Opinion in this case, affirming based on the reasoning in the District Court Judge's Order filed on November 17, 2004. A copy of the unpublished Opinion is included in the Appendix, as is the Order of October 29, 2003 by Judge Norton, United States District Court Judge.

JURISDICTION

On November 17, 2004, the Appeals Court for the Fourth Circuit affirmed the District Court's Dismissal of this case based on lack of jurisdiction (11th Amendment immunity). The petitioner has filed this Petition within 90 days of the date of Judgment. This Court Has Jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

11th Amendment immunity
for State and Federal entities

STATE STATUTORY PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the U.S. Code:
42 U.S.C. 3601, et seq.,
the Fair Housing Act of 1988

STATEMENT OF THE CASE

In this case, the Judge in the U.S. District Court issued an order dismissing Mr. Gregory's claims under the Fair Housing Act of 1988 (FHA), based solely on a finding that the Court lacked Jurisdiction. The Judge found that the Eleventh Amendment excepted all Defendants (one group of Defendants classified as a State agency, and the other as a Federal agency) from the jurisdictional reach of the Court under the FHA, where an individual was suing for monetary damages under the act. Because this case was dismissed for lack of jurisdiction (prior to the filing of an Answer and prior to any discovery being carried out) the facts specifically relevant to the Appeal are very basic, In fact the only really necessary facts are the identities of the parties (Mr. Gregory as an individual citizen, the State entity and individuals as a State agency, and the federal entity and individual defendants as a Federal agency), and the statutory language itself. What is being appealed is almost purely a legal issue.

Mr. Gregory brought suit in U.S. District Court, as an aggrieved individual, under the Fair Housing Act of 1988. He named, as Defendants, a Federal Agency, the U.S. Department of Housing and Urban Development (HUD) and Mr. Stigger, and Ms. Blue (employees who were acting within the scope of their duties). Also named as Defendants were the South Carolina Department of Transportation, and three individuals, who were also alleged to have been acting within the scope of their duties.

A bridge is being built in Charleston, South Carolina to span the Cooper River. As part of the construction effort, SCDOT appraised, and purchased (as a taking) the property in a mostly African American neighborhood, Mr. Gregory's neighborhood. Mr. Gregory lost three pieces of property in the taking. Mr. Gregory claimed that the SCDOT and three individual employees engaged in race discrimination against him by devaluing his property based on consideration of his race, and the overwhelmingly African American racial make-up of Mr. Gregory's neighborhood. He was one of the few, or perhaps the only resident to challenge the SCDOT's appraisals as far below market value. Mr. Gregory claimed that when he attempted to protest the discrimination that he had observed, SCOT, and the named individuals in the Complaint, harassed him and retaliated against him and eventually forced him to accept their offering price. Mr. Gregory, finally unable to

continue to oppose the State, eventually agreed to accept a price for his property that was higher than the original offer, but lower than what he alleges was the fair market value of the property. Mr. Gregory based his appraisal estimates on a professional appraiser, but also on comparison of the price offered for his property with the selling price of similar properties which were being sold only a few blocks from Mr. Gregory's for a price much higher than that offered by SCDOT.

Mr. Gregory attempted to make a complaint to the Federal Defendants, through HUD's civil Rights office. Mr. Stigger and Ms. Blue refused and failed to follow through with the investigation of the complaint, for years after it was filed, first claiming to have lost Mr. Gregory's paperwork, then simply failing to take any action.

Mr. Gregory filed suit against the agencies and the individuals, bringing claims for race discrimination and for harassment and interference with his attempts to exercise his rights under the Fair Housing Act of 1988. The Judge dismissed the case on an issue of law, rather than an issue of fact, ordering a dismissal for lack of jurisdiction, finding that the FHA did not abrogate eleventh Amendment immunity for the State Defendants, and did not waive eleventh Amendment immunity for the Federal Defendants.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER STATE AND FEDERAL AGENCIES AND INDIVIDUALS ACTING WITHIN THE SCOPE OF THEIR AUTHORITY CAN AVOID LIABILITY UNDER THE FAIR HOUSING ACT OF 1988 TO AGGRIEVED INDIVIDUALS FOR RACIALLY DISCRIMINATORY ACTS RESULTING IN HARM TO THE INDIVIDUAL.

I. Eleventh Amendment Immunity does not preclude an individual's suit for damages against a State Entity (S.C. Dept. of Transportations and individuals named) under the Fair Housing Act of 1988

The SCDOT is a State Agency. It was stipulated that Wilkes, Rucker, and Dickson were acting within the scope of their employment as State employees when they took the actions alleged in the Complaint to have given rise to the violations of the FHA plead therein. Thus, under Faust v. South Carolina State Highway Dept., 721 F.2d 934, 936 (4th Cir. 1983), the named Defendants (Respondents), SCDOT and employees, as a State agency, are *eligible for* eleventh amendment immunity protection. However, in this case, Congress has made it clear, in the language of the statute, that the Fair Housing Act of 1988 (FHA) is designed for and does allow the

prosecution of actions against the States and State agencies and entities *by the Federal Government. E.g.* U.S. v. Mississippi, 380 U.S. 128, 140-41, 85 S.Ct. 808, 13 L.Ed 2d 717 (1965). The question of whether this act applies to the States or not is answered unequivocally by the clear language of the Act. It does apply to the States, at least in situations where the United States is the prosecuting entity. The question before the Court, in this case, then, is not whether Congress meant for the FHA to override the States' Eleventh Amendment Immunity, but whether the Judiciary should interpret the Fair Housing Act as an embodiment of specific congressional intent to override the States' Eleventh Amendment immunity to allow a private citizen to be able to collect monetary damages against State entity when the U.S. Government is not a Plaintiff-party. To date, this issue has not been authoritatively decided. Appellate opinions involving States or State agencies as Defendants, in suits brought under the Act have involved only prospective equitable relief, something which would be permitted, even if the eleventh amendment did apply to the Fair Housing Act. See Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 374 n.9, 121 S.Ct. 955, 148 L.Ed. 2d 866, 151 Ed. Law Rep. 35 (2001).

In order for the Court to find that the Eleventh Amendment did not protect the States from civil liability to a citizen under the Fair Housing Act, the Court would have to determine that the statutory language of the Fair Housing Act (FHA) does not specifically grant the right of the citizen to sue the State, or that the right unequivocally granted by the statute is not based on valid constitutional authority.

Garrett, 531 U.S. at 36.

The FHA does contain specific language which authorizes both the U.S. Government and the "aggrieved person" to recover monetary damages from a State. Under 42 U.S.C.3602, Definitions, Congress defined a "person" in such a way as to exclude States or State entities. Congress has defined "State" as:

(d) "State" means any of the several states…

42 U.S.C. 3602(d)

By separating the two, congress is creating a key (as it does with almost every statute), under the definition portion of the statute, to guide the reader as to the meaning of each following section.

The definition or "Respondent" includes:

(1) The person or other entity accused in a complaint of an unfair housing practice; and

(2) the person or other entity identified in the course of an investigation and notified as required with respect to respondents so identified under section 3610(a) of this title.

42 U.S.C. 3602(n)

It appears, from the language of the statute, that Congress clearly intended for entities other than "persons" to be subject to being Respondents, or the target of agency investigations and actions

described under section 3610, under this Act (Section 3610 deals with administrative enforcement of the Act by the Government). The ***only*** type of entity listed in the definitions other than a "person" is a "State." Thus, Congress appears to have intended for States to be subject, at least, to investigation by the Secretary in enforcement actions by the U.S. Government under 42 U.S.C. 3610. Congress clearly intended for the Federal Government to be able to investigate and take actions against the States administratively, under section 3610. Pursuant to 3610, this process is begun by the filing of a charge, naming a Respondent, which can, as shown above, be a State.

Section 42 U.S.C. 3612(a) allows the complainant, the aggrieved person, or even the Respondent (which can be the State) to "elect to have the claims asserted in that charge decided in a civil action under subsection (o) of this section..." 42 U.S.C. 3612(a) A quick review of Subsection (o) of section 3612 reveals that it is entitled "Civil action for enforcement when election is made for such civil action." Within subsection "o", are three sub-sub sections. The first states that, if the election for a civil action is made, the Attorney General "shall commence and maintain, a civil action on behalf of the aggrieved person in a United States District Court seeking relief under this subsection." 42 U.S.C. 3612(o)(1) Number two under Subsection (o) allows the aggrieved person to intervene ***as a***

party in the civil action. Number three states that the Court may grant any relief that is available under section 3613 of this title, including monetary relief. It also explicitly allows the Government to recover monetary relief on behalf of an aggrieved person, even if the aggrieved person does not intervene in the action. The only limit on this is that the Court may not grant monetary damages if the aggrieved person did not comply with discovery orders from the Court. This sub section is key to the Petitioner's argument, as here, the Federal government entity, which we know can actually sue the State, is specifically authorized to seek and recover monetary damages against a "respondent," which we know includes States (as defined in 42 U.S.C. 3602(n) persons and "other entities"), even when the aggrieved person does not intervene. As mentioned above, the appellate cases which address actions against States or State entities all involve prospective equitable remedies. However this does not mean, necessarily, that the statute does not authorize more. Simply because a thing has not been done does not mean that it can not be done.

The answer to the initial question of whether the statute specifically allows for an aggrieved person to recover monetary damages in a suit against a state entity is "yes." In a case where the Federal Government sues a State, on behalf of an aggrieved, person, seeking monetary damages, and the aggrieved person intervenes,

becoming a party, then the aggrieved person, as a citizen, is suing a State for monetary damages under the FHA. The FHA clearly does authorize the collection of monetary damages based on the claim for actual losses of an "aggrieved person," as well as punitive damages through the authorization to pursue "any relief that which a court could grant with respect to such discriminatory housing practice in a civil action under section 3613 of this title." 42 U.S.C. 3612(o)(3) Section 3613, of course, authorizes an award of actual losses and punitive damages, as well as equitable remedies.

Thus, a review of the Statutory language of the FHA shows that 1) a State may be named as a respondent in a charge to be investigated by the Secretary, 2) Congress gave the Secretary authority to pursue the Respondent (including a State) in a civil action, 3) as part of that civil action, the Attorney General may seek actual monetary and punitive damages against the respondent o the aggrieved person's behalf, whether or not the aggrieved person intervenes and 4) the aggrieved person may intervene in a civil action under 3610, become a party to the action, and seek an award of monetary actual and punitive damages ***against a State.*** Though, in section 3613, the section that actually authorizes a private suit, there is no mention of what types of entities may or may not be named as Defendants, the fact that the aggrieved person could elect a civil suit under 3610, then intervene

in such a suit, and pursue the exact same monetary damages available under 3613 indicates that the target of both actions, the Defendant, would be the respondent in a charge. It is clear that a State is subject to being named as a Respondent. By allowing the U.S. Government to collect monetary damages from a respondent on behalf of an aggrieved person, and allowing that aggrieved person to intervene as a party and collect the monetary damages and punitive damages against a State Respondent himself, Congress has unequivocally granted a right (to either party, the U.S. Government on behalf of the aggrieved person, or the aggrieved person himself) to recover monetary damages and punitive damages against a State (or State entity) under the FHA.

II. Federal agencies should be subject to private actions by aggrieved individuals under the Fair Housing Act of 1988.

The statutory language of the Fair Housing Act does specifically provide for monetary remedies against the United States through civil suit by private individuals

A. 42 U.S.C. 3613 provides for enforcement by private persons

This section specifically allows an "aggrieved individual" to commence a civil action in the U.S. District Court. 42 U.S.C. 3613

(a)(1)(A) The section also allows, specifically, for an award of monetary damages, as well as injunctive relief where the Court finds that a "discriminatory housing practice" has occurred or is about to occur. 42 U.S.C. 3613(c)(1) The Court, under this section, is also specifically granted the authority to grant an award of attorney's fees and costs to a prevailing party. In this section, the statute specifically authorizes an award against the United States. "The United States shall be liable for such fees and costs to the same extent as a private person." 42 U.S.C. 3613(c)(2) This statement is within the section entitled "Relief which may be granted."

It is true that, in order to abrogate sovereign immunity for federal defendants concerning claims for monetary awards, a statute must show specific congressional intent to create a remedy including monetary damages. In this case, the statutory language is clear. If the United States loses, it may be subject to an award of attorney's fees and costs the same as any private person. Defendant may argue that Congress intended this language to apply in cases where the United States was prosecuting a case only. But the language does not support that reading. Neither does the location of the clause. The mandate that the United States be subject to attorney's fees and costs like a private party, if it is not a prevailing party is specifically and only mentioned in 42 U.S.C. 3613, a section entitled "Enforcement by private persons." Why would

Congress have inserted this mandate into the statute, in this particular section, unless it was specifically foreseen and intended that private individuals would use 42 U.S.C. 3613 to sue the United States? The Federal Respondents, and Judge Norton, in his Order, point out that the statutory language could refer to the taxing of costs against the United States, if, acting as Plaintiff in a suit under the FHA, it did not prevail. Such an interpretation, however, is not reasonable where the wording, as in this case, appears under a section entitled "Enforcement by Private Persons." This seems to clearly, on its face, preclude the contents of the section from being applicable to enforcement by the Federal Government (which is certainly not a "private person."

B. 42 U.S.C. 3602, Definition of Aggrieved Person, and Discriminatory housing practice show that a Plaintiff is entitled to sue the United States for a violation of 42 U.S.C. 3617.

The private right of enforcement extends to aggrieved individuals, and allows damages where a "discriminatory housing practice" has occurred or is about to occur. Gregory has brought suit against the Federal Defendants for alleged violations of 42 U.S.C. 3617, which is specifically included I the definition of a "discriminatory housing practice" in the

definitions portion of the Fair Housing Act. 42 U.S.C. 3602(f). Gregory is an "aggrieved person," which is includes any person who claims to have been injured by a discriminatory housing practice, or believes that he will be injured by a discriminatory housing practice. 42 U.S.C. 3602 (i)

C. The FHA was designed to allow the direct application of the law to individual cases through the use of private actions against individual discriminators.

The FHA is a Civil Rights Statute, like Title VII. In American Disabled v. H.U.D, 170, F.3d 381 (3rd Cir. 1999), the Court reviewed the legislative history of the statute, indicating that it was specifically designed, like its sister anti-discrimination statutes, to allow individuals to sue directly for discriminatory actions:

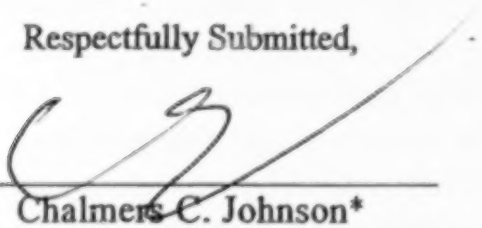
> The nature and structure of the FHA, together with its legislative history, indicate that the FHA was designed to operate like other civil rights laws.... The D.C. Circuit Court of Appeals noted, "to the extent Congress' assessment of alternate remedies is relevant moreover [Supreme Court precedent] suggests that Congress considered private suits to end discrimination not merely adequate, but in fact the proper means for individuals to

enforce Title VI and its sister antidiscrimination statutes." Id. at 390, citing Women's Equity Action League v. Cavazos, 906 F.2d 742, 751 (D.C. Cir. 1990) (emphasis added).

By a review of the clear statutory language in the Fair Housing Act, and considering that the intent of the Act was to provide a means for discrimination to be addressed through private suits, like other Civil Rights Statutes, one can easily see that Congress has specifically abrogated federal immunity for federal defendants where an aggrieved person, such as Gregory, alleges a discriminatory housing practice, like a violation of 42 U.S.C. 3617, and brings suit under 3613 as a private individual. Gregory, as an aggrieved person, and the allegations made in the Complaint, fit the statutory requirements for this claim, and there can be no other reasonable interpretation of Congress' statement that the United States shall be subject to an award of costs and fees like any private party under the private enforcement provisions, than to read this as Congressional mandate abrogating immunity, and allowing a private individual to sue the United States for monetary damages.

For the reasons set forth above, Petitioner LEONARD GREGORY respectfully prays that the Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully Submitted,



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APPENDIX
Rule 14(i)

Rule 14 (i)(i) Opinions, Orders, Findings of fact and conclusions of law entered in conjunction with the judgment sought to be reviewed

Order of October 29, 2003, U.S. District Court (Doc # 34).. 1

Unpublished Opinion, 4th Circuit Court of Appeals, November 17, 2004.. 14

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Leonard Gregory,	)	C/A No. 2:03-1651-18
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER**
	)	
South Carolina	)	
Department of	)	Filed Oct 29 2003
Transportation, Claudia	)	Entered Oct 29 2003
Wilkes, Becky Dickson,	)	
Oscar Rucker, U.S.	)	
Department of Housing	)	
And Urban Development,	)	
Lonna Blue, and Charles	)	
Stigger,	)	
	)	
Defendants.	)	
	)	

I. Background

In the context of motions to dismiss, this court views the facts in a light most favorable to the non-moving party, De Sole v. United States, 947 F.2d 1169, 1171 (4th Cir. 1991); therefore, the court accepts the plaintiff s version of the facts.

Plaintiff alleges that the South Carolina Department of Transportation ("SCDOT") began exercising the state's power of eminent domain in gathering property for the Cooper River Bridge project. Plaintiff alleges that the SCDOT was under a duty to give fair market value for these properties, and further that the SCDOT breached this duty to him with regard to three pieces of property. Plaintiff contends that the SCDOT systematically devalued his and other properties owned by African Americans and "white citizens who owned property in the mostly black neighborhood." (Compl. P 16.) Plaintiff claims that the SCDOT and its agents Claudia Wilkes, Becky Dickson, and Oscar Rucker (the "state defendants") threatened, intimidated, and coerced him into selling his properties for a price less than fair market value. Plaintiff claims that the state defendants targeted him and his neighborhood for a systematic undervaluation appraisal because of his race. After the alleged undervaluation, plaintiff and the state defendants reached an agreement on the selling price for one of plaintiff s properties before condemnation proceedings were begun and on the other two properties after condemnation proceedings were begun. During these negotiations, plaintiff exercised his rights under the Eminent Domain Procedures Act. Plaintiff drew down the proceeds that had been placed with the Clerk of Court by the SCDOT and continued to seek

more compensation for the properties. Plaintiff employed a real estate agent to assist him in negotiations with the SCDOT, and ultimately, plaintiff reached a settlement with regard to all three properties, and the condemnation proceedings were settled and ended. Plaintiff brought the present action claiming that he only agreed to the purchase prices because of defendants' threats and intimidation, and now, due to his acceptance of prices under market value, he cannot afford similar properties in his old neighborhood. Plaintiff also alleges that he first sought redress in this matter from the United States Department of Housing and Urban Development ("HUD"). Plaintiff claims that lie filed a complaint with HUD's Atlanta Fair Housing and Equal Opportunity Office, and that HUD and its agents, defendants Blue and Stigger (the "federal defendants"), failed lo investigate the complaint and interfered with rights guaranteed him under the Fair Housing Act.

II. Legal Analysis

A. The Eleventh Amendment and the SCDOT

The Eleventh Amendment provides: "The Judicial power of the United Stales shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United Stales by Citizens of another Slate, or by Citizens or Subjects of any Foreign State." U.S. CONST, amend. XL By its explicit terms, the language of the Eleventh Amendment applies only to suits against a state by citizens of another state, but the Supreme Court has extended the Amendment's applicability to suits by citizens against their own states. See Kimel v. Florida Bd. of Regents. 528 U.S. 62, 72-73

(2000); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627, 669-670 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44,54 (1996); Bans v. Louisiana, 134 U.S. 1,15 (1890). The practical effect of the Eleventh Amendment in modern Supreme Court jurisprudence is that "nonconsenting States may not be sued by private individuals in federal court." Bd. of Trs. of the Univ. of Alabama v. Garret, 531 U.S. 356,363 (2001). In order for Congress to abrogate the states' sovereign immunity as granted by the Eleventh Amendment, Congress must 1) intend to do so unequivocally and 2) act under a valid grant of constitutional authority. Id, at 363-64. For the first prong of the abrogation test, the Fourth Circuit quoted the Supreme Court from Edelman v. Jordan, 415 U.S. 651 (1974), where the Court announced that in deciding whether a state has waived its constitutional protection under the Eleventh Amendment, the Court will find waiver only where it is stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Faust 721 F.2d at 941 (quoting Edelman. 415 U.S. at 673 and Murray v. Wilson Distilling Co.. 213 U.S. 151.171 (1909)).

Plaintiffs suit against the South Carolina Department of Transportation is barred by the Eleventh Amendment. The Fourth Circuit has recognized that the South Carolina State Highway Department ("SCSHD") was protected by the Eleventh Amendment and thus was not amenable to suit unless Congress abrogated its rights under existing law. Faust v. South Carolina State Highway Pep't. 721 F.2d 934, 936 (4th Cir. 1983). The South Carolina Department of Transportation ("SCDOT") replaced the SCSHD for all

practical purposes as of 1993. See S.C. Code Ann. § 57-3-10 (2002) (the notes following stare, "The 1993 amendment established the structure of the Department of Transportation, in place of former provisions establishing the Department of Highways and Public Transportation, pursuant to a restructuring of the Department").

Plaintiff in this case brought suit under 42 U.S.C. § 3601 *et seq.*, also known as the Fair Housing Act ("FHA"). The argument plaintiff puts forward to suggest abrogation is that the FHA defines "person" separately from "state" in its definition section and then allows suits against "persons or other entities" in its liability section. See 42 U.S.C. §§ 3602,3610 and Pl.'s Brief 2-4. Plaintiff then traces the statute to find that the federal government can sue to enforce the FHA and recover damages for an aggrieved party. Plaintiff theorizes that by filling in a state for "other entity" and allowing a citizen 10 sue where the federal government can, Congress "unequivocally granted a right" for an individual citizen to sue a state under the FHA. (Pl.'s Brief 5.) Other district courts have looked at this precise issue and have disagreed with plaintiff.

See Project Life. Inc. v. Glendening. 139 F.2d 703, 711 (D. Md. 2001) (precluding a recovery of money damages against the Maryland Department of Transportation under the FHA); Welch v. Century 21 Chimes Real Estate. Inc.. 1991 U.S. Dist. LEXIS 2411 (E.D.N.Y. 1991) (holding that the New York Department of State Licensing Division was not a proper defendant under the FHA because there is no express abrogation of the Eleventh Amendment in the FHA). This type of extrapolation would not be necessary if Congress unequivocally intended to abrogate the states' sovereign immunity, as evinced by Congress's boldness of language in other instances. • See 42 U.S.C. § 2000d-7(a) (stating "(1) A State shall not be immune under the Eleventh Amendment...from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance,"): see also Bd. of Trs. of the Univ. of Alabama, 531 U.S. at 363-64 (where the Court held that while Congress unquestionably intended to abrogate Eleventh Amendment immunity in 42 U.S.C. § 12202 by stating that "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter," the abrogation was unconstitutional). The Supreme Court has repeatedly expressed its distaste for lower courts "running afoul of the unequivocal-expression requirement" of the Eleventh Amendment United

States v. Nordic Vill. 503 U.S. 30,38 (1992); see also, Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991) (noting that a general jurisdictional grant does not suffice to show Congress abrogated a state's Eleventh Amendment rights). Plaintiff advances no argument that comes close to the threshold of an unequivocal abrogation; therefore, it is not necessary to reach the second question of whether Congress has acted under a valid grant of constitutional authority.

Once it is established that the Eleventh Amendment applies to a stale agency and that the federal statute sued under does not abrogate that immunity, the only question left is whether the state agency has waived its Eleventh Amendment immunity. Plaintiff does not argue that the SCDOT has waived its immunity; therefore, the issue of abrogation is the only one before this court.

The SCDOT's immunity under the Eleventh Amendment also applies to defendants Wilkes, Dickson, and Rucker in their official capacities. Huang v. Bd. of Governors of Univ. of North Carolina. 902 F.2d 1134, 1138 (4th Cir. 1990) (noting that "the Eleventh Amendment bars a suit by private parties to recover money damages from the state or its alter egos acting in their official capacities"). The Supreme Court has instructed that official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." Kentucky v. Graham. 473 U.S. L59,165 (1985) (quoting Monell v. New York CitvDep't of Soc. Serv.. 436 U.S. 658, 690, n.55, (1978)). These suits are thus treated as suits against the State. Id. at 166. Because South Carolina and the SCDOT have not waived their Eleventh Amendment immunity, plaintiffs complaint must also be dismissed as to the individual

defendants in their official capacities.[1]

B. Sovereign Immunity and HUD

A determination of the existence of (or waiver of) sovereign immunity is a "jurisdictional prerequisite in the nature of, but not the same as, subject matter jurisdiction, in that unless sovereign immunity be waived, there may be no consideration of the subject matter." J.C. Driskill, Inc. v. Abdnor. 901 F.2d 383, 385 n.4. (4th Cir. 1990) (citing Hans v. Louisiana, 134 U.S. 1 (1890)). It is beyond contention that HUD is a federal agency and enjoys sovereign immunity unless Congress has explicitly waived it.

i. Waiver under the FHA

Defendant HUD argues that the Fair Housing Act, 42 U.S.C. §§ 3601-3617, contains no explicit waiver of sovereign immunity. It was established long ago that the United States, as sovereign, "is immune from suit save as it consents to be sued..,and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Testan, 424 U.S. 392,399 (1976) (quoting United States v. Sherwood. 312 U.S. 584,586 (1941)). Any waiver of this sovereign immunity must be "unequivocally expressed," United States v. Mitchell, 445 U.S. 535, 538 (1980), (quoting United States v. King, 395 U.S. 1,4 (1969)), and further, the Supreme Court has noted "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States. 352 U.S. 270, 276 (1957). See also United States v. Kubrick. 444 U.S. III, 117-118

[1] Plaintiff conceded at oral argument that he was

only bringing suit against the SCDOT employees in their official capacities.

1979); Lehman v. Nakshian. 453 U.S. 156,160-161 (1981). HUD simply asserts in its motion that nothing in the FHA meets this threshold requirement of an unequivocal expression of abrogation.
Plaintiff argues that the FHA specifically provides for the recovery of monetary damages against the United States by private individuals through civil suits. (PL's Response Brief 2.) Plaintiff bases his argument on 42 U.S.C. § 3617(c)(2) entitled "Relief which may be granted." Section 36L7(c)(2) states, "[i]n a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person." Plaintiff asserts that the second sentence in that section is an unequivocal abrogation of the United States' immunity from suit. This court disagrees. Section 3617(c)(2) does not meet the unequivocal expression standard. The Supreme Court disfavors the reading of ambiguous statutory provisions as sufficient to waive sovereign immunity. See Lane v. Penn. 518 U.S. 187,192-200(1996). While the Court in Lane uses a provision similar to § 3617(c)(2) to give an example of unequivocal expression, it only comes to that conclusion by analyzing the provision with reference to other provisions of express abrogation. In other words, the phrasing in § 3617(c)(2) alone is not enough for abrogation; it may only pass that challenging test in conjunction with other evidence of Congress's intent to abrogate. Furthermore, the Court again cautioned that

it will "construe ambiguities in favor of immunity." Id. at 192. Section 3617(c)(2) only relates to attorney's fees and court costs, not liability costs. These fees and costs could be awarded when the United States intervenes as a plaintiff, as the FHA allows, not necessarily implying that the United States could be a defendant. The language is ambiguous at best; therefore, sovereign immunity is still intact for HUD in this context.

ii. Waiver under the APA

Next, HUD argues that there has been no waiver of sovereign immunity under the-Administrative Procedures Act ("APA"). HUD explains that plaintiff has not met the elements to sue under the APA, which are 1) be a person adversely affected by a statute or regulation, 2) be the subject of a final agency action, and 3) have no other adequate remedy. 5 U.S.C. § 702 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review") (emphasis added). HUD continues that there has been no final agency action and that plaintiffs remedy is to sue the SCDOT. Plaintiff counters that the agency action does not have 10 be final, and in the alternative, that the agency action is final. These elements are not the immediate issue because § 702 of the APA only deals with parties seeking "relief other than money damages." Plaintiff in the instant action seeks only money damages. The APA has not abrogated HUD's sovereign immunity for the only relief plaintiff seeks in the instant action.

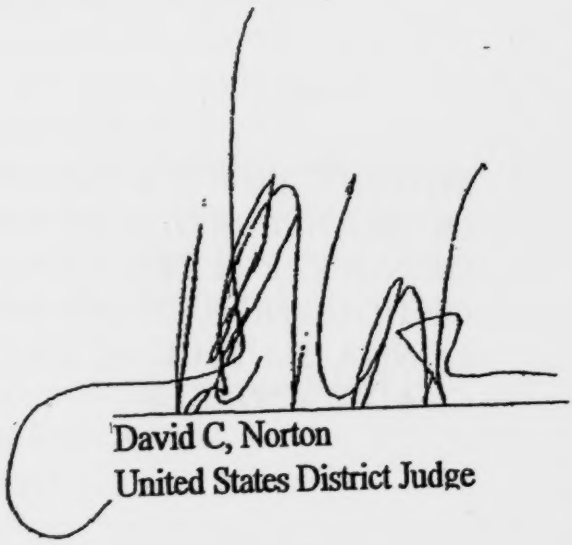
Under the case of Kentucky v. Graham. 473 U.S. 159,165 (1985), and for the same reasons recited under Section II A, supra, the complaints against the

individual HUD defendants must also be dismissed based on sovereign immunity.2

2 Plaintiff conceded at oral argument that the individual HUD employees were also only being sued in their official capacities.

III. CONCLUSION

It is therefore,
ORDERED, for the foregoing reasons, that defendants' motion to dismiss is GRANTED and that plaintiffs complaint is DISMISSED in its entirety. AND IT IS SO ORDERED.
October/ 1,2003
Charleston, South Carolina



David C, Norton
United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2422

LEONARD GREGORY,

Plaintiff-Appellant

Versus

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION; BECKY DICKSON; OSCAR K. RUCKER; U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT; LONNA BLUE; CHARLES STIGGER; CLAUDIA WILKES.

Defendant-Appellees

And

DUDLEY GREGORY,

Defendant.

Appeal from the United States District Court
for the District of South Carolina, at Charleston.

David C. Norton, District Court Judge. (CA-03-1651-18-2)

Submitted: October 27, 2004
Decided November 17, 2004

Before TRAXLER and SHEDD, Circuit Court Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Chalmers C. Johnson CHALMERS JOHNSON LAW FIRM, Charleston, South Carolina, for Appellant. J. Strom Thurmond, Jr., United States Attorney, John H. Douglas, Assistant United States Attorney, Charleston, South Carolina; Robert L. Widener, MCNAIR LAW FIRM P.A., Columbia, South Carolina, Michael A. Scardato, MCNAIR LAW FIRM, P.A., Charleston, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Leonard Gregory appeals the district court's order dismissing this action because the state defendants are immune from suit under the eleventh amendment and his claims against the federal defendants are barred by sovereign immunity. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See

Gregory v. South Carolina Dept. of Transp., No. CA-03-1651-18-2 (D.S.C. Oct. 29, 2003). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED